BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Qwest Corporation to Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order	Docket No. UT-033044 QWEST'S ANSWER TO COVAD'S MOTION FOR SUMMARY JUDGMENT RE DEDICATED TRANSPORT

I. INTRODUCTION

1 Qwest Corporation ("Qwest") hereby files its answer in opposition to Covad's motion for summary determination on the component of Qwest's case concerning dedicated transport. Covad contends that Qwest has "assumed" that transport routes exist. Covad states that Qwest's case is inadequate as a matter of law.[1] Covad is incorrect. Qwest has substantial evidence that CLECs have deployed many transport routes throughout Seattle. Qwest has evidence that carriers are self-provisioning dedicated transport and providing other carriers with dedicated transport as wholesale providers. Several CLECs have already admitted in discovery that they obtain transport on a wholesale basis from carriers other than Qwest. Qwest's evidence should be considered at hearing. The Washington Utilities and Transporta-

[1] AT&T and MCI recently joined Covad's Motion for Summary Judgment. MCI admits that it has deployed many transport routes throughout Seattle, but claims that the routes should not count towards the FCC's triggers. This contention is one that should be tested at hearing under cross-examination.

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tion Commission ("Commission") should deny Covad's motion, hear the evidence, and decide the issue.

II. DISCUSSION

2 The FCC's TRO decision finds as a general matter that CLECs are impaired without access to DS1 and DS3 transport. To overcome the finding of impairment on DS3 transport, the Commission created two objective "triggers" – (1) the "self-provisioning trigger" and (2) the "wholesale facilities" trigger. 47 C.F.R. § 51.319(e)(2)(i). The facts required to support each trigger are different.

3 With respect to self-provisioning trigger, there must be evidence that:

1. Three or more unaffiliated providers have deployed their own transport over a particular route;
2. The transport on the route is operationally ready to use (which includes dark fiber); and,
3. The transport terminates in a "collocation arrangement at each end of the transport route in a Qwest premises."

47 C.F.R. § 51.319(e)(2)(i)(A).

4 With respect to the wholesale facilities trigger, there must be evidence that:

1. Two or more unaffiliated providers have deployed their own transport over a particular route;
2. The transport on the route is operationally ready to use (which includes dark fiber);
3. The wholesale provider is willing to provide DS3 transport along that particular route on a "widely available basis;" and,
4. The transport terminates in a "collocation arrangement at each end of the transport route in a Qwest premises."

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47 C.F.R. § 51.319(e)(2)(i)(B).

5 On December 22, 2003, Qwest filed the testimony of Rachel Torrence identifying 25 dedicated transport routes that Qwest believed met the FCC "triggers" for dedicated transport. On January 16, 2004, Qwest filed an errata to Ms. Torrence's testimony clarifying that Qwest could prove the existence of a few of the 25 routes in multiple ways. Ms. Torrence has not yet filed her rebuttal testimony, which is due on February 20, 2004. In that testimony, Ms. Torrence will provide additional facts concerning dedicated transport.

6 Ms. Torrence has put forward evidence that many CLECs have collocations in particular central offices, that the same CLECs brought fiber to a manhole just outside of those central offices, and that she had verified the existence of the transport facilities along particular routes. Since the filing of the direct testimony, Qwest has uncovered evidence that suggests some of the transport routes identified in Ms. Torrence's testimony may not satisfy the triggers. As required, Qwest will withdraw these routes before the hearing. Similarly, Qwest has obtained additional evidence that many of the routes identified by Ms. Torrence do satisfy at least one if not both of the FCC triggers. Qwest is entitled to relief along these routes.

7 For example, one carrier admits that it has obtained dedicated transport along certain routes on a wholesale basis from carriers who are parties to this proceeding. This transport is provided at DS1 and DS3 capacity levels. *See Highly Confidential Attachment 1.* Thus, it is clear that some carriers lease transport to CLECs at least along some routes. MCI's responsive testimony admits that MCI has transport along virtually all of the routes identified by Ms. Torrence in her direct testimony. *See Rebuttal Testimony of Mark L. Stacy at Highly Confidential Exhibit MLS-4.* MCI, however, argues that its transport does not satisfy the FCC triggers because it is provisioned in OC48 increments, rather than DS3 increments. *Id. at pp. 37-39 and Exhibit MLS-4.* An OC48 is the equivalent of 48 DS3 equivalent circuits, and can

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be provisioned in DS3 increments.

8 AT&T's position is similar:

> [A]n ILEC that wishes to establish a finding of no impairment based on the self-provisioning triggers for a particular transport capacity level, e.g., below 12 DS-3s, must show that three carriers have self-deployed at the relevant capacity level. Thus, a carrier that has deployed transport at a capacity level of, e.g., 18DS3 circuits, or that has deployed optical level (OC) transport facilities, would not count for these purposes. If three carriers had self-deployed transport circuits at a level of 12 DS3s (or less), then the self provisioning trigger would be met. . .

Direct Testimony of Anthony J. Giovannucci at p. 27. Because of this point, AT&T avers that it has not deployed transport facilities that satisfy the triggers.

9 At this point, Qwest has not deposed either MCI or AT&T about these points. Whether through deposition or on cross-examination at hearing, Qwest plans to delve into whether Qwest's information about the location and use of AT&T's and MCI's transport facilities (as well as others transport facilities) is accurate. Covad's Motion is an attempt to keep Qwest from inquiring into these facts at hearing and presenting the evidence it has found on each of the identified dedicated transport routes.

A. The Summary Judgment and Evidentiary Standards Applicable to this Case are Reason, in and of themselves, to Deny Covad's Motion

10 Summary judgment is appropriate only when the undisputed evidence shows one party cannot prevail. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The tribunal reviews all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The moving party bears the burden of showing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). A genuine material fact dispute exists if

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"there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). The Commission's rule on summary determination, WAC 480-07-380(2)(a), applies the standards under CR 56.

11 It appears that Covad's true argument is that Qwest cannot base its dedicated transport case on circumstantial evidence. However, it is well settled that a litigant can prove its case based on circumstantial evidence. *E.g., Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-180 (Wash. 2001) ("Circumstantial, indirect and inferential evidence . . . suffice[s] to discharge the plaintiff's burden" to survive summary judgment on employment discrimination claims); *Englehart v. General Electric Co.,* 11 Wn. App. 922, 926 (Wn. App. 1974) ("accidental death . . . may be established by reasonable inferences from circumstantial evidence"). Covad argues that Qwest must produce "actual, verifiable evidence" that transport exists along each route. In other words, Covad argues that Qwest must produce conclusive un-contradicted evidence of such transport facilities. Covad's suggested legal standard exceeds even that required for a criminal conviction.

12 In the traditional civil case, the moving party has the burden of proof by a preponderance of the evidence. In this case, however, the FCC did not even go that far, affirmatively stating that there was no burden of proof in the matters delegated to the state commissions. Specifically:

> As guidance for [the FCC's] analysis . . . we explain the kinds of evidence we will find most persuasive in those discussions. We do not adopt a "burden of proof" approach that places the onus on either the incumbent LECs or competitors to prove or disprove the need for unbundling. Rather, in the application of our standard, we examine the record evidence in light of the Act's goals to make the best determination regarding the need for unbundling.

TRO at ¶92. For this reason, the FCC dismissed a request that ILECs bear the burden of proof to show that CLECs are no longer impaired. *Id*. at n. 307. Summary judgment is inappropriate here because the Commission's role is to evaluate the evidence at hearing, and decide whose evidence is more persuasive on each of the dedicated transport routes in issue. In other words,

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the Commission employs a preponderance of the evidence standard without any particular party bearing the burden of proof. Covad moves for summary judgment claiming that Qwest has not met its burden of proof, a burden Qwest does not bear. For this reason alone, the Commission should reject Covad's motion.

B. <u>The TRO Provides the Legal and Factual Basis for the Commission to Reject Covad's Motion</u>

13 Covad's Motion is based entirely on two faulty premises. First, Covad argues that a carrier must deploy DS3 transport, and that deploying OCn transport – a higher capacity facility – is inadequate as a matter of law. This is the same point argued by AT&T and MCI in their testimony. Second, Covad claims that a facility cannot be used in the trigger analysis if it enters the Qwest Central Office with an entrance facility. Both of these arguments are completely without basis.

1. Deploying OCn Transport is Adequate as a Matter of Law.

14 Covad states that the provision of OCn transport along a particular route cannot be used to meet the FCC's trigger unless Qwest can show that owner of the fiber has "the ability [to] channelize the OCN system into lower transport levels." Motion at 4. The FCC rejected this approach outright. "When carriers self-deploy transport facilities, they typically deploy *fiber rings* that may connect several incumbent LEC central offices in the market." *TRO* at ¶370. "The optical circuits operate and interface at a range of capacities, up to OC192." *TRO* at ¶372. "An OC3 circuit equals the capacity of three DS3 circuits. . . . Effectively, each OCn capacity interval indicates the capacity of the equivalent number of DS3 circuits – for example, an OC48 has the capacity equivalent to 48 DS3 circuits." "Therefore, competing carriers are not necessarily leasing physically separate facilities, but rather, dedicated bandwidth capacities along a given route." *TRO* at ¶372.

15 The question the TRO asks is whether it is economic for a CLEC to deploy transport capacity

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along a particular route. *TRO* at ¶376. "We find that, when three carriers, in addition to the incumbent LEC, have each made sunk investment in transport facilities on a route, that is a sufficient indication that sunk costs, economies of scale, and other barriers to deploying transport facilities do not present an economical insurmountable barrier on a particular route such that requesting carriers are not impaired without access to unbundled transport." *TRO* at ¶405. To the extent a carrier has deployed OCN fiber, by definition it is economic to deploy DS3 transport because the carrier has already deployed multiple equivalent DS3 circuits along the route in question.

> For these reasons, a reliable measure of the ability of competing carriers to incur additional costs related to obtaining transport from an alternative provider, or self providing, is based on the capacity competing carriers require along a transport route. Because a carrier using higher capacity levels of transport has a greater incentive and broader revenue base to support the self-provisioning of transport facilities, we adopt an approach to analyzing transport that considers different capacity levels. We expressly consider ***the ability of competing*** carriers to self provision transport facilities. . . . based on different transport capacity levels.

TRO at ¶377 (emphasis added). If a CLEC deploys OCn transport, certainly it has the "ability" to deploy DS3 transport.

16 Covad's argument (which AT&T and MCI join in their written testimony) is that placement of an optical circuit cannot meet the FCC's DS3 standard because it is a different transmission capability. This is patently absurd. The Commission should reject Covad's argument that deployment of OCn transport is inadequate to meet the triggers, and instead affirmatively find that deployment of OCn transport is satisfactory deployment under both of the FCC's triggers. Once this finding is made, Ms. Torrence has submitted substantial evidence that OCn transport exists along many routes. Further, a review of Highly Confidential Attachment 1 raises a question of material fact as to whether transport is available at DS3 levels from wholesale carriers, even though AT&T and MCI claim that it is not.

2. Use of a Fiber Entrance Facility to Connect the CLEC's Transport to its

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Collocation Satisfies the FCC's Triggers.

17 Covad's second argument is that Qwest cannot establish that each transport element terminates in a collocation. Covad recognizes that Ms. Torrence verified the existence of the transport in manholes adjacent to the central office in question, and verified that the same carrier had a collocation within the central office. *Motion* at 4. In addition, however, MCI's responsive testimony admits that it does bring dedicated transport into these manholes just outside of the central office, connects to an entrance facility, enters the central office, and terminates in a collocation. *See Rebuttal Testimony of Mark L. Stacy at Highly Confidential Exhibit MLS-4.* Covad, however, claims that the facility is not dedicated transport because it uses a fiber entrance facility to connect to its collocation. This argument also misses the mark.

18 Qwest's approved SGAT in Washington states that a CLEC may use an "entrance facility" to bring its fiber into the central office. The collocation provisions of the SGAT state that a collocation allows the use of a fiber entrance facility:

> 8.2.4.2 Collocation Fiber Entrance Facilities. Qwest offers three Fiber Collocation Entrance Facility options – Standard Fiber Entrance Facility, cross-connect Fiber Entrance Facility, and Express Facilities. These options apply to Caged and Cageless Physical Collocation and Virtual Collocation. Fiber Entrance Facilities provide the connectivity between CLEC's collocated equipment within the Qwest Wire Center and a Collocation Point of Interconnection (C-POI) outside the Qwest Wire Center where CLEC shall terminate its fiber-optic facility, except Express Facilities.

As this provision makes plain, the purpose of the entrance facility is simply to ensure that the CLEC's transport can enter the central office and terminate in the CLEC's collocation.

19 The evidence put forward by Ms. Torrence shows an aggregation of facilities in manhole zero, and collocations for the same carriers inside the building. This combination of facts, coupled with the SGAT provision, makes plain that this is how CLECs bring their transport facilities into the central office. This combination of facts is not a "mere argumentative assertion" that

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Covad claims justifies summary judgment. *Motion* at 3, *citing Blakely v. Housing Authority of King County*, 8 Wn. App. 204, 210, (1973). To the contrary, it is a combination of facts that coupled together would lead any reasonable person to conclude that the CLEC has brought dedicated transport to the Qwest central office.

III. CONCLUSION

20 Covad's Motion is based upon many faulty layers. It applies the wrong legal standard in that it demands perfect evidence in a proceeding the FCC defines as one without a burden of proof. It argues that circumstantial evidence is never enough alone, and ignores the admissions made by other parties in the docket. It argues that the carrier must have deployed DS3 fiber, and not optical circuits that are the equivalent of many DS3 circuits. It also argues Qwest cannot bring the CLEC's transport into the central office with an entrance facility. Each of these arguments misses the mark.

21 Ms. Torrence has provided substantial evidence that many CLECs have deployed dedicated transport along several routes in Washington. Even though the FCC found that CLECs have "built fiber to 35 percent of wire centers which provide access to 61 percent of the incumbent LEC's lines," *TRO* at ¶378, AT&T, Covad and MCI all claim that there is not a single route in Seattle that meets this FCC's triggers. This assertion simply defies logic. This is an issue that needs to be brought before the Commission for consideration of the evidence. The Commission can then weigh the evidence and decide whether the CLECs have deployed transport thereby satisfying one of the FCC's triggers. The Commission should deny Covad's motion for summary judgment.

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